

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RENE H. GONZALEZ
Claimant

VS.

IBP, INC.
Self-Insured Respondent

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Docket Nos. 251,742;
251,743; 251,744;
251,745 & 251,746

ORDER

Claimant requested review of the January 24, 2003 Award of Administrative Law Judge Brad E. Avery. The Board heard oral argument on July 23, 2003. The Director of the Division of Workers Compensation appointed Jeffrey K. Cooper of Topeka, Kansas, to serve as Board Member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding. Gary M. Peterson was also appointed as Board Member Pro Tem for the purpose of determining this matter.¹

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

These cases were consolidated and the parties agreed that the date of accident would be February 23, 1999. The primary issue raised before the Administrative Law

¹ Gary M. Peterson retired from the Board effective March 31, 2003, and his replacement has not yet taken office.

Judge (ALJ) was the nature and extent of claimant's functional impairment. The ALJ relied upon the court ordered independent medical examiner's opinion and awarded claimant a 20 percent permanent partial functional impairment to the body as a whole.

The sole issue raised on review by the claimant is the nature and extent of disability. Claimant contends Dr. Pedro A. Murati's opinions and 36 percent permanent partial functional impairment to the body as a whole are more persuasive and should be adopted.

Conversely, respondent argues that Dr. Jeffrey T. MacMillan's opinions and 5 percent permanent partial functional impairment rating to the body as a whole should be given more weight because he was claimant's authorized treating physician. In the alternative respondent requests the ALJ's Award be affirmed.

The sole issue for determination by the Board is the nature and extent of claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered injury performing his repetitive work activities for respondent. In summary, claimant's work required that he use a knife and hook. He began to experience pain and numbness in both of his hands, wrists and elbows. In approximately September 1998, he injured his shoulder and left upper extremity and then later injured his low back while performing light-duty work cleaning a conveyor belt in approximately February 1999.

Claimant was provided medical treatment and was later referred to Dr. Jeffrey T. MacMillan on December 23, 1999, for additional treatment. Dr. MacMillan was provided the medical records from the physicians that had treated claimant as well as a prior EMG of claimant's upper extremities and an MRI of claimant's lumbar spine. The doctor diagnosed claimant with left shoulder impingement, left tennis elbow and a degenerative disk with spinal stenosis at L3-4. The doctor noted claimant in the past had complained of carpal tunnel symptoms confirmed by a positive EMG nerve conduction study but was no longer complaining of those problems. And the doctor noted the Phalen's testing he performed was negative at that time.

Dr. MacMillan treated claimant with a subacromial cortisone injection for his left shoulder and prescribed an anti-inflammatory medication. At subsequent office visits the claimant continued to complain of left shoulder, left elbow and low back pain. In

February 2000, the doctor referred claimant for a functional capacity evaluation and noted the report indicated that claimant performed at a higher level than expected based upon the severity of his complaints of pain. The doctor noted this confirmed his opinion that claimant's complaints of pain were out of proportion with his objective level of ability to function.

The doctor concluded claimant reached maximum medical improvement on April 20, 2000. The doctor opined, based upon the Fourth Edition of the *AMA Guides*², that claimant had a 5 percent permanent partial functional impairment to the body as a whole because of his degenerative disk at L3-4. But the doctor concluded claimant did not have any functional impairment to his left upper extremity because he had normal range of motion.

The claimant's attorney referred him to Dr. Pedro A. Murati for examination and evaluation for a rating on February 19, 2001. Dr. Murati testified the claimant's chief complaints were neck pain, bilateral shoulder and elbow pain, bilateral wrist and hand pain as well as low back pain radiating into both legs.

Dr. Murati diagnosed the claimant with right carpal tunnel syndrome and ulnar cubital syndrome; left carpal tunnel syndrome; bilateral rotator cuff strain vs. tear with severe AC crepitus; myofascial pain syndrome affecting the bilateral shoulder girdles; cervical strain; lumbar strain; and bilateral SI joint dysfunction.

Based upon the *AMA Guides*, Fourth Edition, Dr. Murati opined the claimant has a 5 percent permanent partial disability due to low back pain secondary to the lumbar strain. And an additional 8 percent for loss of range of motion to the lumbar spine. Dr. Murati rated the claimant's neck pain secondary to cervical sprain as a 4 percent permanent partial disability. Dr. Murati rated the claimant's right hand with a 10 percent impairment to the right upper extremity due to the carpal tunnel syndrome. For the right shoulder pain secondary to severe AC crepitus, the claimant received an 8 percent to the right upper extremity. Claimant also received an additional 10 percent on the right for a mild entrapment of the ulnar nerve at the elbow. The impairments to the right upper extremity combine for a 25 percent right upper extremity impairment. Claimant received a 10 percent rating for his left carpal tunnel syndrome. He has AC crepitus on the left which the doctor determined was an 8 percent impairment. Converting the upper extremity ratings to impairments to the whole body and combining the various whole body impairments results in a 36 percent permanent partial functional impairment to the whole body.

Because of the disparity between the ratings provided by Drs. MacMillan and Murati, the ALJ ordered an independent medical examination of claimant to be performed by Dr.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*

Peter V. Bieri. Dr. Bieri examined claimant on July 6, 2001. Dr. Bieri was provided the extensive medical records from claimant's treating physicians including Dr. MacMillan. And Dr. Bieri also was provided Dr. Murati's report.

Dr. Bieri noted claimant complained of pain in multiple areas but that his low back pain bothered him the most. Claimant also complained of diffuse neck and shoulder pain, more on the left than the right, as well as intermittent numbness and tingling with pain in both upper extremities. But the doctor noted all of claimant's symptomatology was improved since terminating his work activities. The doctor noted his examination of the cervical spine neither revealed muscle spasm nor findings of tenderness to light palpation. And claimant had a full and unrestricted range of motion of the cervical spine. Examination of the shoulders revealed inconstant crepitance on the left but no findings on the right and range of motion was full and unrestricted for each shoulder.

The doctor concluded that although claimant had subjective complaints involving the right shoulder, left elbow and cervical spine at the evaluation, he did not meet the criteria for permanent impairment for those areas. However, the doctor did conclude, based upon the *AMA Guides*, Fourth Edition, that claimant suffered a 7 percent whole person impairment for the lumbar spine. For the left upper extremity claimant was awarded 6 percent for residuals of crepitance and impingement syndrome and 10 percent for the left upper extremity mild entrapment neuropathy. The combined left upper extremity impairment would be 15 percent which converts to a 9 percent whole person impairment. For the right upper extremity entrapment neuropathy claimant was provided a 10 percent impairment which converts to a 6 percent whole person impairment. The combined whole person impairment was 20 percent.

The claimant limited his request for compensation to his functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides*. At the time of claimant's injury, the Act required that functional impairment be based on the Fourth Edition of the *AMA Guides*.³ The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁴

Dr. MacMillan treated claimant from December 23, 1999, through April 20, 2000, when he concluded claimant had reached maximum medical improvement. During this treatment claimant complained of left shoulder, left upper extremity and low back pain.

³ K.S.A. 1998 Supp. 44-510e(a).

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Neither right shoulder nor cervical complaints were noted. Dr. Bieri conducted a thorough examination and specifically noted he could not find objective criteria to find permanent impairment for the cervical complaints or the right shoulder complaints.

The ALJ adopted Dr. Bieri's opinions as more persuasive and the Board agrees. The opinion of the physician appointed by the ALJ should not be blindly adopted, however, the physician appointed by the ALJ should, on the other hand, be neutral. This does not always mean the rating is most accurate. In this case, the rating by the physician appointed by the ALJ appears to correspond with claimant's complaints and to appropriately evaluate claimant's impairment. The Board agrees with and affirms the ALJ's decision.

AWARD

WHEREFORE, it is the finding, of the Board that the Award of Administrative Law Judge Brad E. Avery dated January 24, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director